IN THE COURT OF APPEALS OF IOWA

No. 0-621 / 09-1699
Filed September 9, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY RUSSELL DAVENPORT SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas H. Preacher, Judge.

Defendant appeals sentencing enhancement. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and James Cosby, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

In September 2009, a jury found Timothy Davenport Sr. guilty of operating while intoxicated (OWI).[1] Based on Davenport's stipulation to prior convictions, the court enhanced his sentence to third-offense OWI. On appeal, Davenport alleges ineffective assistance of counsel for failure to file a motion in arrest of judgment. He claims counsel should have challenged the procedure used to find he had two prior OWI convictions. We affirm and preserve Davenport's ineffective-assistance-of-counsel claim for a possible postconviction relief proceeding.

Davenport claims his counsel was ineffective for failing to move in arrest of judgment when the court did not conduct an open-court colloquy prior to enhancing his sentence. In order to prevail, Davenport must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id*. at 392. "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Postconviction proceedings allow an adequate record to be developed and allow the attorney charged with providing ineffective assistance an opportunity to respond to the defendant's claims. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002).

Because Davenport faced an OWI charge that imposed an enhanced penalty for prior convictions, the State was required to conduct a two-stage trial.

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[1] The jury also found Davenport guilty of failure to yield to an emergency vehicle and reckless driving. Davenport does not appeal these convictions.

See State v. Kukowski, 704 N.W.2d 687, 691 (Iowa 2005). After a jury found Davenport guilty of the September 2009 OWI offense, the State was then required to prove his prior convictions. *See id*. Iowa Rule of Criminal Procedure 2.19(9) (2009), governs the procedure following a jury's guilty verdict:

> *Trial of questions involving prior convictions*. After conviction of the primary or current offense, but prior to pronouncement of sentence . . . the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted or that the offender was not represented by counsel and did not waive counsel.

"If a defendant affirms the validity of the prior convictions, then the case proceeds to sentencing." *Kukowski*, 704 N.W.2d at 692. The defendant's affirmance, however, is not the end of the required process. Our Iowa Supreme Court has instructed:

> An affirmative response by the defendant under [rule 2.19(9)] does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender. *The court has a duty to conduct a further inquiry, similar to the colloquy under rule 2.8(2) [guilty pleas], prior to sentencing to ensure that the affirmation is voluntary and intelligent.*

Id. (emphasis added). The court thus determines that the defendant's affirmation or stipulation is made with "an adequate grasp of the [sentencing] implications of his or her stipulation." *Id*.

Following the jury's verdict the following exchange occurred between the court and the attorneys:

> Prosecutor: I have one question, since I am new to this: We have an agreement as to the stipulation as to the first and second, do I need to present that now?
>
> Court: It is probably a good idea to make that on the record. It is my understanding, Mr. Koos, the defendant will stipulate that

> he has had two prior convictions of OWI within the twelve years prior to March 23, 2009?
>
> Mr. Koos: That's correct.

The State concedes the record, which "included no colloquy between the court and Davenport, was not sufficient under Rule 2.19(9) as construed in *Kukowski*." The trial court did not question Davenport in open court to ensure his stipulation was made with an understanding of the sentencing implications and to ensure his decision was voluntary and intelligent. Therefore, the record is adequate for us to conclude counsel breached a duty in failing to make a motion in arrest of judgment.

Next, Davenport must prove prejudice because his "conviction will not be reversed unless the judicial misstep complained of prejudiced" him. *Straw*, 709 N.W.2d at 138. Davenport's stipulations avoiding an enhancement trial are analogous to a guilty plea. Therefore, we conclude the prejudice standard is also analogous: "[I]n order to satisfy the prejudice requirement, [Davenport] must show that there is a reasonable probability that, but for counsel's errors, [he] would not have [stipulated to his prior convictions] and would have insisted on going to trial." *Id*. (refusing to adopt a per se rule of prejudice where counsel failed to move in arrest of judgment after a guilty-plea proceeding in which the district court did not substantially comply with the rules of criminal procedure).

The record contains nothing to show what Davenport would have done if there had been no failure of duty on the part of his counsel. Additionally, Davenport's trial counsel has not had an opportunity to respond to this claim. *See State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997) (stating preservation for

postconviction proceedings allows full development of the facts). Accordingly, this is not the rare case where Davenport has mustered enough evidence to prove prejudice without a postconviction hearing. We affirm and preserve Davenport's ineffective-assistance-of-counsel claim for possible postconviction relief proceedings. *See Straw*, 709 N.W.2d at 138.

AFFIRMED.